

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 12, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-3658

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**IN THE INTEREST OF MATTHEW D.,
A PERSON UNDER THE AGE OF 18:**

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

MATTHEW D.,

RESPONDENT-APPELLANT.

APPEAL from an order of the circuit court for Dane County:
ROBERT R. PEKOWSKY, Judge. *Reversed and cause remanded.*

ROGGENSACK, J.¹ Matthew D. appeals a non-final order² waiving him into adult court to face one charge of being party to the crime of

¹ This appeal is decided by one judge pursuant to § 752.31(2)(e), STATS.

² This court granted Matthew's petition for leave to appeal on December 11, 1997.

robbery. He claims that: (1) the department's failure to provide sufficient programs for sixteen-year-old offenders deprived him of equal protection; (2) the failure of the social worker assigned to his case to adequately investigate his background deprived him of due process; and (3) the juvenile court abused its discretion when it waived jurisdiction based on an erroneous view of the law. For the reasons discussed below, this court agrees that the juvenile court acted upon an erroneous view of the law and therefore reverses the order waiving juvenile court jurisdiction and remands for further proceedings in juvenile court.

BACKGROUND

According to the delinquency petition filed by the State on August 29, 1997, Matthew D. was one of three teenage males at the Columbia County Fair who agreed to take Nick G. to buy cigarettes, after Nick had shown them a roll of money from a recent paycheck. The boys drove to a park, where they all got out of the car and one or more of the group pulled Nick's shirt over his face and punched and kicked him; then they took \$280.00 from him and left. Matthew had just turned sixteen the month before the incident.

The State petitioned to waive Matthew into adult court, and the juvenile court held a waiver hearing on October 21, 1997. Eugene Weidemann, Matthew's assigned social worker, testified that Matthew had been living with his mother for the preceding six months, and had recently begun participating in the Work and Learn program through his school, where he was doing acceptable work. He stated that Matthew had had some trouble complying with his mother's rules regarding school attendance and curfew in the past, but that he had improved since he began the Work and Learn program. Weidemann noted that Matthew had never been referred to the agency before, much less adjudicated delinquent, and

that supervision in his parents' homes would be possible placements. However, he also pointed out that most of the agency's resources were directed toward younger offenders, and that there were few programs to offer Matthew. Notwithstanding the shortage of resources for a child Matthew's age, one possibility he mentioned was an intensive supervision program called Right Track Second Chance; another was the Alternatives to Aggression program. Weidemann opined that foster care, a group home or a residential facility were not appropriate, due to Matthew's age, and in any event, he did not believe that parenting problems were a factor in Matthew's behavior. To the contrary, he believed that Matthew's parents would be a resource for him. He also stated that the one year, eight months remaining until Matthew reached his majority could be enough time for the juvenile court to effectively supervise him.

Weidemann did think that a correctional placement might be appropriate, given the serious nature of the crime, but he was concerned that a juvenile correctional program such as SPRITE would take Matthew out of his current school program where he was making good progress. He also noted that "it's not clear that [out of home] placement is necessary." In the absence of waiver, he believed that some sort of program of supervision could be constructed for Matthew. At one point, he even mentioned a consent decree as a possible alternative, if the option of waiver could be kept open, prompting confusion as to what his recommendation would be. Ultimately, he based his recommendation for waiver (a choice which he deemed "a tough one") on two factors: the nature of the crime, and the fact that the other two offenders, who had prior records, were both being waived into adult court.

Tracey Einerson, Assistant Director at the Sunburst Preschool, testified that Matthew had been volunteering there three hours a day, Monday

through Friday, as part of the Work and Learn program. She said that he had been doing very well, that he got along with the children, which was somewhat unusual in the program, and that he often came in early or stayed late.

Matthew's teacher, Janice Lange Morris, testified that Matthew was maintaining a B average in the academic portion of the program. She said that he was quiet and worked by himself, was friendly with other students, and occasionally talked out of turn, but had never been violent. She said that the program had strict attendance standards, and that Matthew was meeting them.

Matthew's guidance counselor, David Hoppe, testified that he observed Matthew as passive/resistant, but not violent, aggressive or threatening. He stated that he had many contacts with Matthew regarding truancy prior to his entry into the Work and Learn program, and that Matthew always acted respectfully, even when he did not follow through on school attendance. He stated that Matthew's participation in the Work and Learn program represented the longest period of time in which Matthew had not been truant.

Matthew's neighbor, Linda Bailey, testified that Matthew played with her children, and did not appear to be substantially free of parental control. She said he kept to himself, and was not a leader-type. She considered him to be "just a kid."

Vicki Lind also testified that Matthew spent time with her children and in her home, and that he was very respectful to her. She had never seen him act violently or aggressively. She did not believe he was functioning independently of his parents, because he had rules to follow and chores to do, and he looked to his parents for guidance when making decisions.

Matthew's father, Gerald D., testified that Matthew had lived with his mother since their divorce seven years earlier, except for one period of a few months in which Matthew came to live with him because he was having trouble communicating with his mother and was skipping school. Gerald stated that Matthew had improved since he began Work and Learn and further, since the arrest, Matthew appeared to take his personal responsibilities more seriously.

Matthew's mother, Karen D., testified that she believed that Matthew's problems with truancy corresponded with his use of marijuana, but that he had successfully completed drug treatment. She said, it was as though he had come back into the family since drug treatment, and that he was relating better to his sisters too. She also said that he seemed to be motivated to participate in the Work and Learn program, because he got himself to school daily, and he enjoyed it.

The State argued that since juvenile correction facilities accept children only up to the age of seventeen, the court would have no control over Matthew should he violate a consent decree after he turned seventeen; that a juvenile correction placement would take him out of his school program, contrary to his best interests; and that leaving him at home with his mom on supervision would be no more than a slap on the wrist for a serious crime. The State suggested that the long term probation which would be available in the adult system might be the most appropriate disposition of the case.

The juvenile court reasoned:

[W]hile the law still allows me to do certain things, in fact the opportunities for youth as they grow older are less in terms of treatment, in terms of resources in the community.... [T]here aren't frankly a lot of things that can be done, in particular when there is no evidence of a

treatment need, for someone who's 16 and a half or going to be 17.... We just don't have anything here that meets this kid's needs.

Although the court thought that Matthew was, if anything, immature for his age; it commented that the crime was “overwhelmingly serious because it involves activities that are planned,” and concluded that any proceedings in juvenile court would unduly diminish the seriousness of this offense. The court waived jurisdiction over Matthew and denied his motion for reconsideration.

DISCUSSION

Standard of Review.

The decision whether to waive jurisdiction over a juvenile rests within the discretion of the juvenile court. *J.A.L. v. State*, 162 Wis.2d 940, 960, 471 N.W.2d 493, 501 (1991). When reviewing such a discretionary determination, this court examines the record to determine if the circuit court logically interpreted the facts in the record and applied the proper legal standard to them. *State v. Rogers*, 196 Wis.2d 817, 829, 539 N.W.2d 897, 901 (Ct. App. 1995). No deference is due in considering whether the proper legal standard was applied, because it is this court's function to correct legal errors. Therefore, we will review *de novo* whether the juvenile court properly interpreted § 938.18 STATS., when making its waiver determination. *See State v. Carter*, 208 Wis.2d 142, 560 N.W.2d 256 (1997) (applying *de novo* review to the legal standard used in a sentencing context).

Waiver of Juvenile Jurisdiction.

“The transfer of [a] juvenile to the adult criminal process is a grave step.” *D.H. v. State*, 76 Wis.2d 286, 292, 251 N.W.2d 196, 200 (1977). The juvenile court may waive its jurisdiction over a minor charged with a criminal offense only when “the court determines on the record that it is established *by clear and convincing evidence* that it would be contrary to the best interests of the juvenile³ or of the public to hear the case.” Section 938.18(6), STATS. (emphasis added). In making its determination, the court shall consider the following criteria:

(a) The personality and prior record of the juvenile, including whether the juvenile is mentally ill or developmentally disabled, whether the court has previously waived its jurisdiction over the juvenile, whether the juvenile has been previously convicted following a waiver of the court’s jurisdiction or has been previously found delinquent, whether such conviction or delinquency involved the infliction of serious bodily injury, the juvenile’s motives and attitudes, the juvenile’s physical and mental maturity, the juvenile’s pattern of living, prior offenses, prior treatment history and apparent potential for responding to future treatment.

(b) The type and seriousness of the offense, including whether it was against persons or property, the extent to which it was committed in a violent, aggressive, premeditated or wilful manner, and its prosecutive merit.

(c) The adequacy and suitability of facilities, services and procedures available for treatment of the juvenile and protection of the public within the juvenile justice system, and, where applicable, the mental health system and the suitability of the juvenile for placement in

³ Under Wisconsin’s former juvenile code, “[t]he best interests of the child [were] always [to] be of paramount consideration.” Section 48.01(2), STATS., 1993-94. However, that directive has been deleted from the revised statutes, placing consideration of the public interest on an equal footing with concern for the juvenile’s welfare. See 1995 Act 77 and § 938.01, STATS.

the serious juvenile offender program under s. 938.538 or the adult intensive sanctions program under s. 301.048.

(d) The desirability of trial and disposition of the entire offense in one court if the juvenile was allegedly associated in the offense with persons who will be charged with a crime in circuit court.

Section 938.18(5).

The evidence that retaining jurisdiction in juvenile court would be contrary to the best interests of the child or of the public must be clear and convincing before waiver may occur. Section 938.18(6), STATS. This “middle burden of proof requires a greater degree of certitude than that required in ordinary civil cases but a lesser degree than that required to convict in a criminal case.” *Kruse v. Horlamus Industries, Inc.*, 130 Wis.2d 357, 363, 387 N.W.2d 64, 67 (1986).

Here, Weidemann, upon whose opinion the court relied for its conclusion, testified that Matthew’s satisfactory school report, lack of a prior record, and family situation all supported retention of juvenile court jurisdiction, and that supervision could be effective within the time frame remaining for the juvenile court to exercise jurisdiction. There was no testimony that Matthew had been unresponsive to supervision in the past. To the contrary, his seeking and following through on treatment for a drug problem without any involvement from the juvenile system suggests that supervision could be successful. Additionally, because there was at least one service available in the juvenile system (namely, supervision), which would have been suitable for Matthew, that factor weighed in favor of retention of juvenile jurisdiction, regardless of the scarcity of other appropriate services or facilities for other offenders his age with different needs.

Weidemann's testimony that waiver might impress on Matthew the seriousness of his offense may weigh in favor of waiver. Additionally, we appreciate and are assisted by the juvenile court's consideration of this difficult case, and we do not disturb its finding that the offense was a serious one due to its premeditated nature. Nor do we dispute that the juvenile court was entitled to place more weight on Weidemann's opinion than those of the seven other witnesses, all of whom testified that Matthew ought to be treated as a juvenile. However, if one statutory factor is to outweigh all of the other relevant factors the court is bound to consider in a waiver decision, that factor must stand out clearly as more crucial to the best interests of the child or to the public than any of the others.⁴ And further, the circuit court must articulate its reasoning on the record in this regard. To do otherwise, constitutes an erroneous exercise of its discretion. *State v. C.W.*, 142 Wis.2d 763, 769, 419 N.W.2d 327, 329-30 (Ct. App. 1987). It did not do so in this case. Therefore, we must reverse the decision to waive juvenile court jurisdiction over Matthew.

CONCLUSION

While the juvenile court may properly determine that certain options within the juvenile system are inappropriate for the juvenile at issue, it cannot waive jurisdiction unless the record reflects clear and convincing evidence to support the waiver decision. And, it must articulate, on the record, why the factors that are relevant to its decision advance the protection of society or the best

⁴ It was unclear from the record whether the trial court put any weight on the fact that the other two offenders were being waived into adult court, but we note that under § 938.18(5)(a), STATS., each juvenile's waiver must still be based upon his individual profile. Additionally, the record indicates that the other offenders' cases had progressed to the point that waiver would not facilitate trying all the offenders together.

interests of the juvenile. Because the record here reflects neither, we reverse the waiver and remand for further proceedings in juvenile court.

By the Court.—Order reversed and cause remanded.

This opinion will not be published. See RULE 809.23(1)(b)4.,
STATS.

